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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

NO. 791

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,
Petitioner,

vs.

A. WALTER SMITH AND VIRGINIA SMITH,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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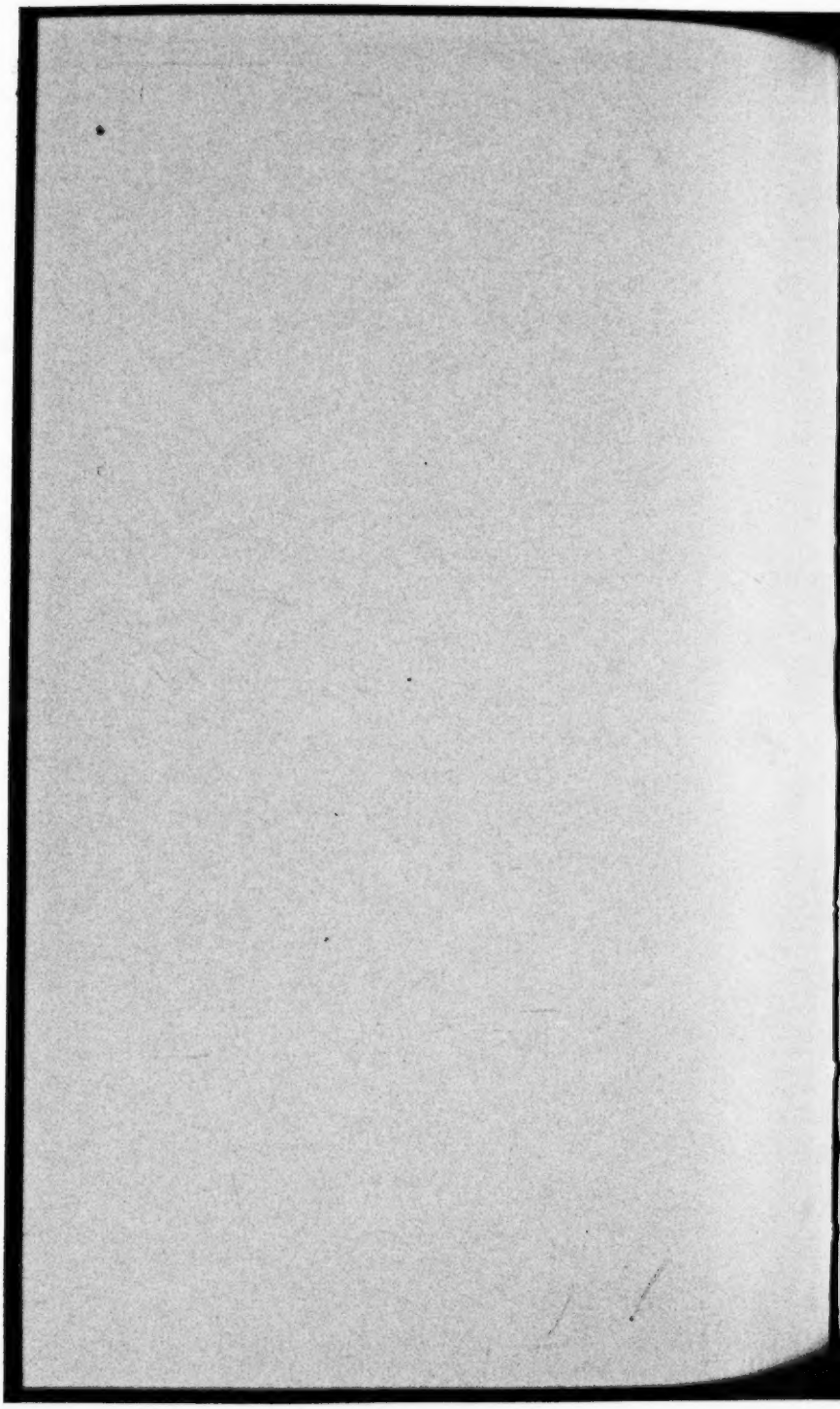

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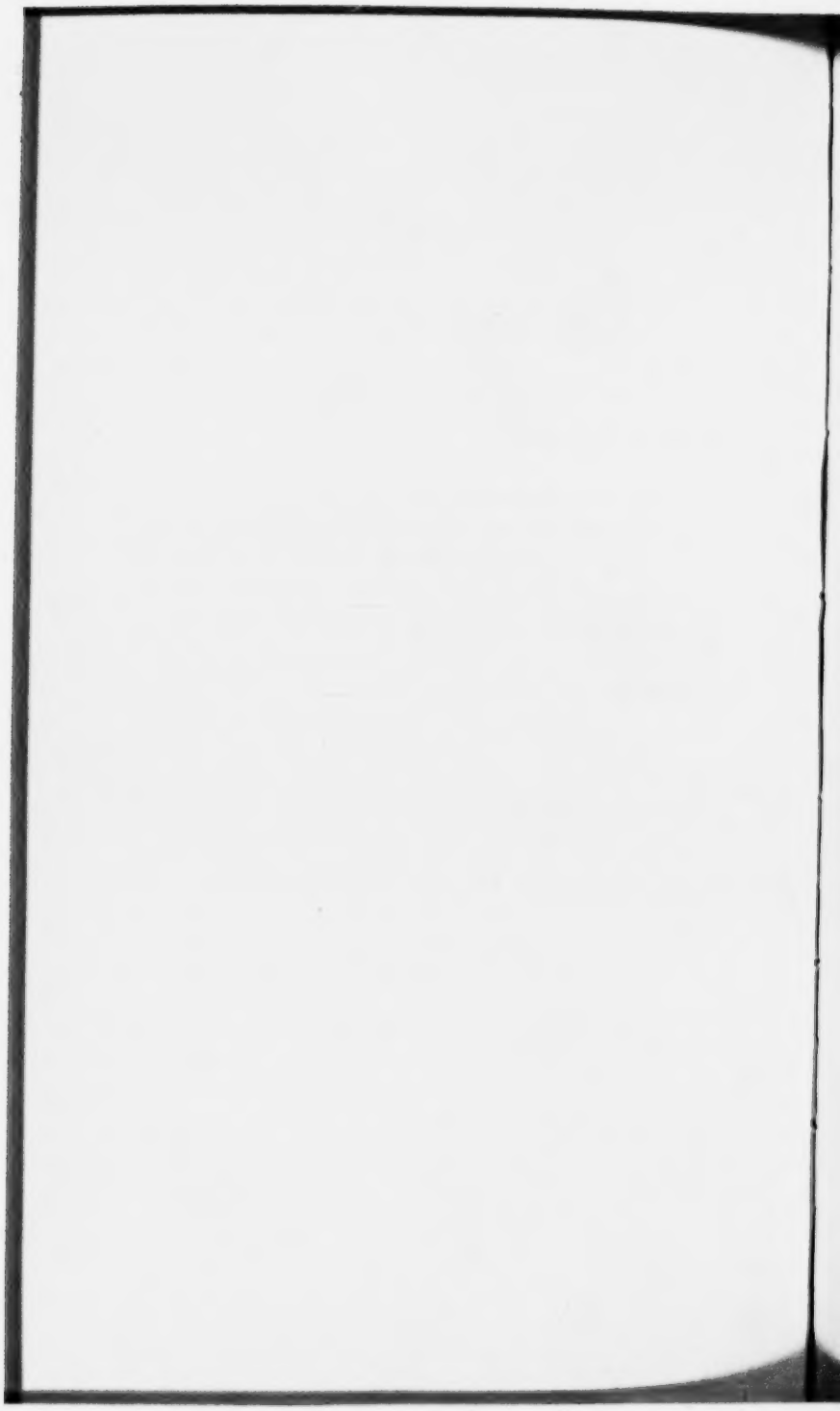

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QUESTION PRESENTED

The sole and only question presented by petitioner's application for certiorari is "whether the United States Court of Appeals erred in holding that the trial court did not err in calling an advisory jury." Petitioner contending

that the ruling of the Court is directly in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Hargrove v. American Central Insurance Co.*, 125 F. 2d 225.

SUMMARY OF ARGUMENT

Petitioner did not object to the calling of a jury as such. In fact, petitioner agreed to a trial by jury and acquiesced in the procedure by requesting the submission of issues to the jury.

Hargrove v. American Central Ins. Co., 125 F. 2d 225, l. c. 227, 228, 229.

ARGUMENT

Respondents contend that the decision of the Court is not in conflict with the ruling of the Court in *Hargrove v. American Central Insurance Co.;* that in fact, the decision is entirely in harmony with the ruling of the Court in *Hargrove v. American Central Insurance Co., supra.*

The trouble with petitioner's position in this case is that petitioner in the court below did not object or except to the action of the Court in calling a jury; in fact, petitioner expressly acquiesced in the action of the Court, and even asked the Court to submit certain issues to the jury.

In support of this contention we invite the Court's attention to Record, pages 348-351, wherein petitioner herein (plaintiff below) requested the Court to submit to the jury its Instructions 1 and 2, and also asked the submission of

certain issues, as follows (Record 348):

> "The plaintiff further excepts to the refusal of the Court to instruct the jury that — we except to the refusal of the Court to submit Instruction 1, Plaintiff's Instruction 1, to the jury.
>
> Further, the plaintiff excepts to the refusal of the Court to submit to the jury or to determine the issue of false swearing in the proof of loss which was pleaded in the complaint, and the plaintiff thinks is a material part of this case."

The United States Court of Appeals in rendering its decision in this case also found that petitioner (plaintiff below) made no objection or exception to the calling of a jury, and in fact, acquiesced therein, as is shown by the following portion of the opinion of the Court (Record, pages 390, 391, 392):

> "Appellant first contends that 'the court erred in calling a jury in an advisory capacity over the appellant's objections and submitting interrogatories to it, for the reason that it was mandatory upon the trial court to try and decide the issues without the aid or advice of a jury, the parties having waived the right to trial by jury and having made no motion for same.'
>
> "*We find no place in the record where counsel for appellant objected to the calling of a jury.* In the opinion of the court is the statement that 'Neither the plaintiff nor the defendants requested a jury . . . Prior to the time the case was called for trial, the court advised the parties that the court would, of its

own motion, call a jury to try and determine such disputed facts as might arise during the trial.'

"The record shows that a jury was examined on their voir dire and duly selected and sworn, after which counsel for each party made opening statements to the jury. At the close of the evidence counsel for appellant requested separate instructions upon the issues; but made no objections to trial to the jury. Again, after the court had instructed the jury counsel for appellant took exceptions to certain instructions given and to the failure of the court to give all the instructions requested by him.

"While the verdict of the jury is limited to answers to the three interrogatories, supra, the court's findings of fact and conclusions of law covered every issue in the case • • •

"It follows that the court did not err in calling an advisory jury. It also follows that *appellant cannot be heard to complain because it in effect agreed to trial by an advisory jury in that it saved no objection to the jury, but acquiesced in the procedure.* See the *Hargrove and Lumbermens cases, supra,* and the cases cited therein. • • •

"Further, it should be noted that the appeal here is not from the verdict of the jury but from the judgment entered by the court, and the judgment is supported by complete findings of fact on every issue." (Record 392) (Italics inserted.)

It is to be noted that the United States Court of Appeals for the Tenth Circuit cited the *Hargrove case, supra,* in supporting its ruling on the question of the District

Judge submitting issues to the jury. The conduct of the attorneys in the *Hargrove* case, with reference to the Court's calling a jury, was very similar to the conduct of the attorneys in the case at bar. Of that situation, the Court said the following in the *Hargrove* case, in upholding the District Judge (l. c. 227 & 229).

> "Neither party demanded a jury before trial and apparently at the time of the trial neither party considered that the cause was one triable of right by jury. But at the commencement of the trial, the court advised the parties that a jury would be impanelled in an advisory capacity. Neither party objected but acquiesced in the action of the court by agreeing that answers to interrogatories submitted to the jury might be returned by three-fourths or nine of the jurors. At the conclusion of the evidence, without objection from either party, the court submitted certain interrogatories which the jury answered. • • •
>
> "• • • The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain." (l. c. 229.)

Respondents respectfully submit that petitioner has failed to show any conflict of decision, and that the writ should be denied.

Respectfully submitted,

FERD J. FRANKENHOFF,
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Counsel for Respondents

The opinion in this case by the Judges of the Eighth Circuit is reported in 180 Fed. 2d 371.